Petition

81-1363

No. _____

Office - Supreme Court
FILED
JAN 11 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

HOLT MARINE TERMINAL, INC.,

Petitioner,

v.

TRANSPORT INTERNATIONAL POOL, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

QUESTION PRESENTED

Under the Due Process Clause of the Fourteenth Amendment, can a party be precluded from litigating the issue of damages where it has not unequivocally waived the right to contest this issue?

THE PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Holt Marine Terminal, Inc., petitioner herein and a defendant in the proceedings below; Transport International Pool, Inc., a respondent herein and plaintiff in the proceedings below; and Marine Transport Service, Inc., a respondent herein and a defendant in the proceedings below. Marine Transport Service, Inc. failed to answer in the original action brought in the Superior Court of New Jersey, Law Division, and a default judgment was entered against it. Plaintiff believes that Marine Transport Service, Inc. has no interest in the outcome of this petition and has, pursuant to Rule 19.6 of this Court, so notified the Clerk of the Court by separate letter and served a copy of such notice on all parties to the proceedings below.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case	4
Reasons for Granting the Writ	9
The Court Below Erroneously Decided a Significant and Far-Reaching Question Of Law Under the Due Process Clause Of the Fourteenth Amendment Not Heretofore Determined By This Court	9
Conclusion	24
Appendix	25

TABLE OF AUTHORITIES

	Page
Cases:	
Bass v. Hoagland, 172 F.2d 205 (5th Cir.), cert. denied, 338 U.S. 816 (1949)	20-21
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	11
Boddie v. Connecticut, 401 U.S. 371 (1971)	11
In re: Bryan, 645 F.2d 331 (5th Cir. 1981) .	18
Fuentes v. Shevin, 407 U.S. 67 (1972)	12, 17
Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972) .	15
Goldberg v. Kelly, 397 U.S. 254 (1970)	11
Henry v. Williams, 299 F. Supp. 36 (N.D. Miss. 1969)	17
Hovey v. Elliott, 167 U.S. 409 (1897)	22
Ken-Mar Airpark, Inc. v. Toth Aircraft & Accessories Co., 12 F.R.D. 399 (W.D. Mo. 1952)	20

Page

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 12

Nelson v. McCarthy, 637 F.2d 1291 (9th Cir. 1980), cert. denied, 101 S.Ct. 2021 (1981) 18

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 11

Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481 (3d Cir. 1965) .. 15

Sniadach v. Family Finance Corp., 395 U.S. 397 (1969) 11

Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972) 12, 18-19

Constitution, Statutes and Rules:

United States Constitution: Fourteenth Amendment 3

28 U.S.C. § 1257(3) 3

28 U.S.C. § 2101(c) 2

Sup. Ct. R. 20.4 2

Fed. R. Civ. P. 55(b)(2) 20

The petitioner Holt Marine Terminal, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, is unreported and appears in the Appendix hereto at 1a. The same court's denial of petitioner's petition for rehearing is unreported and appears in the Appendix hereto at 11a. The opinion of the Supreme Court of New Jersey denying petitioner's petition for certification is unreported and appears in the Appendix hereto at 14a. The opinion of the Supreme Court of New Jersey denying petitioner's motion for reconsideration of the denial of the petition

for certification is unreported and appears in the Appendix hereto at 16a.

JURISDICTION

The judgment and opinion of the Superior Court of New Jersey, Appellate Division, was decided in this proceeding on May 18, 1981. The order of the same court denying petitioner's petition for rehearing was decided on June 17, 1981.

The order of the Supreme Court of New Jersey denying petitioner's petition for certification was decided on September 3, 1981 and entered on September 4, 1981. The order of the same court denying petitioner's petition for reconsideration of the denial of the petition for certification was decided on October 13, 1981 and entered on October 14, 1981. This petition for a writ of certiorari is filed within 90

days of that denial of rehearing, pursuant to 28 U.S.C. § 2101(c) and Rule 20.4 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)

STATEMENT OF THE CASE

Petitioner Holt Marine Terminal, Inc. ("Holt") is involved in stevedoring and related services, primarily the loading and unloading of vessels, and has its principal place of business in Gloucester City, New Jersey. In 1976, petitioner Holt gave respondent Transport International Pool, Inc. ("Transport") four guarantees of the performance by Marine Transport Service, Inc. ("Marine") of certain lease agreements between Marine and Transport. The leases required Marine to insure the equipment covered by the leases and to provide certificates of insurance to Transport. Marine provided Transport with some insurance certificates, but Transport failed to determine whether the insurance covered the loss of vehicles and, in fact, the insurance did not.

When Marine failed to return all of the equipment, Transport commenced an action in the Superior Court of New Jersey, Law Division against both Marine and Holt for the claimed value of the equipment. Marine failed to answer and the trial court entered a default judgment against Marine for $173,990.37. The court also entered summary judgment against Holt in the same amount on the ground that the default judgment against Marine was res judicata and as such binding against Holt.

On appeal to the Appellate Division of the Superior Court ("Appellate Division"), Holt contended that the judgment was not res judicata and that the guarantees were not enforceable against it because Transport had not ascertained whether Marine had obtained insurance adequate to cover the loss of the equipment as required in the lease

agreements between Transport and Marine. The Appellate Division affirmed, although not for the reasons expressed by the court below. The Appellate Division determined that res judicata did not apply against Holt but decided that Holt was not entitled to a plenary hearing on the issue of liability. The court concluded that Holt had no real defense to Transport's claim because its guarantees were "unconditional" and it had waived "diligence". The court also expressed its belief that Holt was conceding that the sums determined in fixing the default judgment against Marine would be binding on it, and that Holt was not demanding a hearing on the issue of damages.

The record demonstrates that Holt was denied a hearing on the issue of damages even though genuine issues of material fact existed. On a motion for

rehearing, Holt advised the Appellate Division that it had not conceded the issue of damages and that a hearing on that issue was necessary. The Presiding Judge, however, rejected Holt's petition for rehearing, expressing the opinion that Holt's counsel, Michael A. Spero, had conceded in his reply brief and at oral argument that damages were not an issue.

Holt's petition for certification to the Supreme Court of New Jersey was denied on September 4, 1981. Its motion for rehearing of that denial was denied by the same court in an order filed on October 14, 1981.

As the record and an affidavit submitted by Mr. Spero to the New Jersey Supreme Court in connection with Holt's petition for certiorari to that court (see Appendix at 18a-22a) clearly demonstrate, Mr. Spero (i) never conceded the issue of damages, (ii) did not make a

statement at oral argument that was intended to be a concession of the amount of damages claimed by plaintiff, and (iii) to the best of his belief did not say anything at oral argument that should have been construed as a concession. If this Court refuses to grant a writ of certiorari in this case, petitioner will be utterly precluded from presenting any evidence on the question of damages and denied its right to cross-examine the proof of respondent Transport on that issue. The power of the Appellate Division to deprive petitioner of these fundamental rights, on the record in this case where the issue of damages was never conceded either by Holt or its counsel, presents a question of fundamental constitutional importance ripe for review by this Court.

REASONS FOR GRANTING THE WRIT

The Court Below Erroneously Decided A Significant and Far-Reaching Question Of Law Under the Due Process Clause Of the Fourteenth Amendment Not Heretofore Determined By This Court

Petitioner Holt requests this Court to issue a writ of certiorari in this action to rectify the denial of petitioner's right under the Due Process Clause of the Fourteenth Amendment to a hearing on the question of damages in this case. Absent this Court's intervention, petitioner will be bound by a determination of the Appellate Division as to the amount of the purported damages in this case without ever having had the full and fair opportunity to litigate either the amount of those damages or, indeed, whether any damages at all are owed by petitioner.

The decision of the Appellate Division refusing to allow petitioner Holt an evidentiary hearing as to damages threatens summarily and arbitrarily to impose damages on petitioner in clear violation of petitioner's fundamental right under the Due Process Clause of the Fourteenth Amendment not to be deprived of its property without due process of law. This is not a case turning upon its own special facts or of consequence solely to the parties herein. The serious impact of this decision, one that must ultimately be felt by numerous other litigants, makes it vital that this Court decide finally the novel issue at stake in this case, i.e., the summary deprivation of important property rights absent the opportunity for an evidentiary hearing.

It appears that the specific question of whether the Due Process

Clause of the Fourteenth Amendment allows damages to be summarily imposed without the opportunity for a hearing is a question of first impression before this Court. However, this Court has many times noted that the most basic element of due process is the full and fair opportunity to be heard to protect against the arbitrary deprivation of property and liberty interests. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); cf. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971) (party against whom estoppel is claimed must have had full and fair opportunity to litigate issue). When the amount of damages is at issue, the right to cross-

examine the plaintiff's witnesses and to introduce affirmative testimony in mitigation thereof are no less essential to insure against the arbitrary deprivation of property in violation of due process than, for example, the debtor's right to a hearing where a creditor is attempting to deprive him of his property. See also Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67, 96 (1972); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972).

In its per curiam opinion, the Appellate Division said that petitioner Holt had agreed that the sum determined in fixing the default judgment against Marine should be binding on Holt. In its petition for rehearing of that decision, petitioner advised the court that it had not conceded that issue. In rejecting petitioner's petition for

rehearing, the Presiding Judge said that: (i) petitioner had acknowledged in its reply brief that "the evidentiary hearing on damages. . . could be binding upon defendant in the event defendant [petitioner] was unsuccessful after a trial on the merits," and (ii) counsel for petitioner conceded without reservation at oral argument that damages on the proof hearing were binding.

There was nothing in the record indicating that petitioner had made any such unequivocal concession or acknowledgments as to its right to contest the issue of damages. Indeed, petitioner's counsel submitted an affidavit to the New Jersey Supreme Court in connection with the petition for certification (Appendix 18a-22a) stating that no such concession was ever intended to have been made or, to the best of his belief, was in fact made. Certainly no

such concession was authorized by petitioner. This Court should therefore grant the petition and affirm that the constitutional right to a hearing includes the right to a full and fair opportunity to litigate the question of damages. The Appellate Division's arbitrary deprivation of petitioner's fundamental right without a hearing is a blatant violation of due process and cannot be permitted to stand.

From the time it first filed and served its answer, petitioner Holt has contested the amount of damages claimed by respondent. Petitioner continued to dispute the amount of damages in the affidavit it filed in opposition to respondent's original motion for summary judgment in the trial court, in its brief in opposition to respondent's second motion for summary judgment, in its brief to the Appellate Division and

in its briefs to the Supreme Court of New Jersey. Although the Presiding Judge failed to suggest a legal theory or cite any cases to support his view that Mr. Spero's statement in his reply brief could deprive petitioner of a hearing, the Presiding Judge apparently considered the statements to be judicial admissions. Such reliance plainly violates the well-settled principle that a judicial admission must be clear and unequivocal to be binding. Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972); Rhoades, Inc. v. United Air Lines, Inc., 340 F.2d 481 (3d Cir. 1965).

The statement made by Mr. Spero in his reply brief that petitioner could be bound by the evidentiary hearing which had been held in fixing the default judgment against Marine cannot be construed as an unequivocal waiver depriving petitioner of its constitu-

tional right to a hearing. The word "could" certainly cannot be construed as the type of unequivocal language which would constitute an admission and, in his affidavit, Mr. Spero stated that no such admission was intended.

Moreover, the statement of the Presiding Judge that Mr. Spero had made a concession at oral argument that damages on the proof hearing were binding was erroneous and arbitrary leaves petitioner without the right to litigate the damages question. Mr. Spero submitted a sworn affidavit categorically stating that (i) petitioner has never conceded the amount of damages, (ii) no statement was made at oral argument that was intended to be a concession on the amount of damages, (iii) to the best of his belief, nothing was said at oral argument that should have been construed as a concession on the issue of damages.

Even if Mr. Spero had made such an admission at oral argument he was unauthorized to do so and his statement cannot deprive petitioner Holt of its fundamental and constitutionally protected right not to be arbitrarily deprived of its property without an evidentiary hearing. The right to a hearing is a critical and substantial right, and may not be waived without petitioner's knowing and voluntary consent. Henry v. Williams, 299 F. Supp. 36, 49 (N.D. Miss. 1969) ("Neither mistake, nor ignorance, nor inadvertance of counsel may constitute a knowing and conscious waiver of a federal constitutionally protected right.")

This Court should reaffirm that every reasonable presumption against the waiver of constitutional rights must be indulged. See, e.g., Fuentes v. Shevin, 407 U.S. 67, 94 &

n.31 (1972) (in civil, no less than criminal area, courts indulge every reasonable presumption against waiver of procedural due process rights); In re Bryan, 645 F.2d 331 (5th Cir. 1981); Nelson v. McCarthy, 637 F.2d 1291 (9th Cir. 1980), cert. denied, 101 S. Ct. 2021 (1981).

Indeed, at least one federal court has recognized that the right to a hearing as to the amount of damages is a procedural guarantee of the due process clause, and a waiver cannot be lightly implied. In Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970), aff'd, 405 U.S. 191 (1972), the court enjoined the entry of any confessed judgment against any member of the plaintiff class, which included all Pennsylvania residents earning less than $10,000 annually who had signed confession of judgment clauses in leases or consumer

financing transactions. The court based its decision on a finding that the debtors had not consented to a waiver and that the plaintiffs had a right to notice and a hearing because the procedure, as applied to the class, was "based upon a concept of waiver without adequate understanding." 314 F. Supp. at 1100. The court expressly stated that the class members were entitled "to the opportunity of a hearing on [their] claims conducted in accordance with the procedural guarantees of the due process clause.". Id. at 1102 (footnotes omitted). The court added that "at such hearings the burden of proving default, execution of the obligation, the amount due, and other elements necessary to execution will be on the creditor. . . ." Id. (emphasis added). This Court should similarly resolve this issue.

That the refusal of the Appellate Division to allow petitioner Holt a hearing on the issue of damages is an unconstitutional deprivation of property is also supported by those cases that hold that a failure to give notice prior to taking a default judgment pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure constitutes a failure of due process.* Bass v. Hoagland, 172 F.2d 205 (5th Cir.), cert. denied, 338 U.S. 816 (1949); Ken-Mar Airpark Inc. v. Toth Aircraft & Accessories Co., 12 F.R.D. 399 (W.D. Mo. 1952). In Hoagland, the defendant had appeared but a default judgment was rendered because

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* Fed. R. Civ. P. 55(b)(2) provides that a default judgment on a claim which is not for a sum certain or for a sum which can by computation be made certain may be entered only by the court, and if the party against whom judgment is sought has appeared in the action, only after he or his representative is served with written notice of the application for judgment at least three days prior to the hearing on such application.

his attorney had withdrawn from the case. The court noted, however, that there had been no withdrawal of the defendant's appearance and therefore "[t]he case was still not in default and thereby confessed." 172 F.2d at 209. Plaintiff gave no notice of the purported default to the defendant. The Court expressly noted that the defendant had not waived any of his rights. Id. It held that "[t]o get such a judgment without evidence and without notice is not in our opinion due process of law." Id. at 210.

If the failure to give notice of a hearing prior to the taking of a default judgment, on a claim which is not for a sum certain or for a sum which can by computation be made certain, constitutes a failure of due process, then surely the refusal to allow a hearing as to damages which are hotly

contested constitutes a failure of due process as well.

This Court, in Hovey v. Elliott, 167 U.S. 409 (1896), held that a decree pro confesso entered after striking a defendant's answer as a punishment for his contempt in refusing to obey an order of the court was void for want of due process of law. In vacating the decree, the court stated:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

167 U.S. at 413-14.

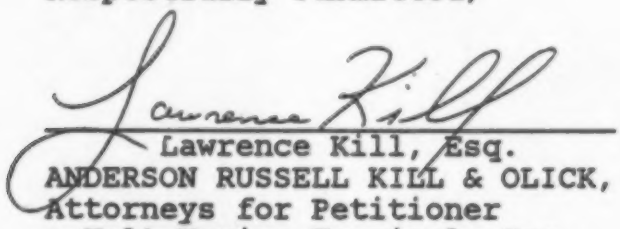
The rationale expressed by this Court in Hovey in support of its protection of the right of due process

applies equally to the due process right to a hearing on damages at stake in this case. Petitioner has a constitutional right to a hearing on damages. At the very least petitioner has a right to a hearing as to whether it at any time knowingly or voluntarily waived that right. Neither such hearing has been accorded the petitioner. Therefore, a writ of certiorari should issue to rectify the injustice done to petitioner in this case, and to put both federal and state courts on notice that the summary and arbitrary imposition of damages without the protection afforded by an evidentiary hearing will not be tolerated by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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January 11, 1982

Appendix

APPENDIX

	Page
Per Curiam decision of Superior Court of New Jersey, Appellate Division, dated May 18, 1981	1a
Order of Appellate Division Denying Appellant's Petition for Rehearing dated June 17, 1981	11a
Order of New Jersey Supreme Court filed on September 4, 1981 denying Petition for Certification	14a
Order of New Jersey Supreme Court filed on October 14, 1981 denying motion for reconsideration of denial of petition for certification .	16a
Affidavit of Michael A. Spero, Esq.	18a

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4001-79-A

TRANSPORT INTERNATIONAL POOL, INC.,

Plaintiff-Respondent,

v.

HOLT MARINE TERMINAL, INC.,

Defendant-Appellant,

and

MARINE TRANSPORT SERVICE, INC.,

Defendant.

Argued: May 5, 1981 -- Decided: May 18, 1981

Before Judges Fritz, Polow and Joelson

On appeal from Superior Court of New Jersey, Law Division, Camden County.

Michael A. Spero argued the cause for appellant (McCarthy and Hicks, attorneys).

Steven G. Wolschina argued the cause for respondent (Brown, Connery, Kulp, Wille, Purnell & Greene, attorneys; Mr. Wolschina and John J. Mulderig, on the brief).

PER CURIAM

This is an appeal from an order of summary judgment in favor of plaintiff, Transport International Pool Inc., (Transport) against defendant, Holt Marine Terminal, Inc. (Holt) for $173,990.57 on a guarantee agreement from Holt. We affirm.

It is undisputed that in order to induce plaintiff to lease equipment to Marine Transport Service, Inc. (Marine), Holt absolutely and unconditionally agreed to guarantee the performance of any and all obligations of Marine, arising from any such leases. It is further uncontroverted that as a result, Transport entered into four leases with Marine for the equipment which consisted

of numerous trailers, and that each lease was undergirded by a Holt guarantee agreement which contained the following provision:

> NOW THEREFORE, in consideration of the premises as stated above and for other good and valuable consideration, Holt hereby absolutely and unconditionally guarantees the performance of any and all obligations of Marine, arising from the lease agreement referred to above, including but not limited to the payment of all rentals and charges arising thereunder. Holt hereby waives diligence, demand, presentment, protest, or notice of any kind or any requirement that Transport exhaust any right or take any action against Marine, and hereby consents to any extension of time of payment or renewal of the foregoing lease agreement. Holt further hereby agrees to pay all reasonable attorneys' fees and court costs connected with the enforcement of this Guarantee and the enforcement of obligations provided hereunder.

Because Marine failed to return all the leased trailers, Transport brought action against both Marine and Holt for the value of the missing

trailers. Since Marine failed to answer, default judgment was entered against it for $173,990.37 and the summary judgment under appeal for the same amount was thereafter awarded plaintiff against Holt.

Although we concur with the result reached below, we cannot agree that the default judgment against Marine was res judicata and as such binding against Holt. Plaintiff in its claim of the applicability of res judicata relies largely on Scaglione v. St. Paul - Mercury Indemnity Co., 28 N.J. 88 (1958). However, that case is significantly different from the one before us because it involved a defendant which, having been given the opportunity to defend, declined to avail itself of that opportunity. In Scaglione, an insurance company refused to defend a workers' compensation action on the mistaken

belief that the employer had no coverage at the time the worker was injured. Action was brought against the insurance comp.ny to enforce an award to the employee granted in the action which it refused to defend. In holding that the trial judge had correctly granted judgment against the insurance company, the court stated:

> . . . [U]nder the doctrine of res judicata a judgment may be conclusive against one who is liable over to the judgment debtor in respect to the cause of action adjudicated, or one derivatively responsible to the judgment creditor, at least where there has been notice to the third party of the prior action and an opportunity to defend afforded. The principle applies to indemnitors, sureties and guarantors. . . . [Id. at 104-105.]

Despite the reference to indemnitors, sureties and guarantors quoted above, Id. at 104, it must be emphazied that it concerns the application of the doctrine of res judicata

"where there has been notice to the third party of the prior action and an opportunity to defend afforded." In the case we are now considering there was no prior action since the guarantor was joined as a defendant along with the primary obligor. Furthermore, no opportunity to defend was afforded the guarantor. If it had a meritorious defense, it should have been given a chance to present it at a plenary hearing. Monmouth Lumber Co. v. Indemnity Ins. Co. of North America, 21 N.J. 439 (1956).

However, we are satisfied that a plenary hearing is not here required since Holt has no real defense. Although not setting it up as a separate defense in its answer, Holt argued in opposition to the motion for summary judgment and now argues on appeal that the leases had been materially altered and that it was, therefore, absolved of

its guarantee. It bases this on a contention that plaintiff waived a provision in the leases that Marine present it with certain specified insurance policies. While the trial judge found res judicata to apply by reason of the default judgment, he did not ignore the defense asserted by Holt. On the contrary, he found it "without merit due to the unconditional nature and broad scope of the guarantees. . . ." In this respect, we agree with the trial judge.

The leases, the performance of which Holt absolutely and unconditionally guaranteed, obligated the leasee "to return the vehicles to lessor in good condition, normal wear and tear excepted." The vehicles in question were not returned. However, Holt points to the provisions of the lease requiring that simultaneously with or prior to delivery

of the leased equipment, the lessee must deliver to the lessor a policy or policies of insurance "satisfactory to the Lessor," covering specified risks including theft. Plaintiff was given certificates of insurance for these risks, but after the equipment was not returned, these policies were determined not to cover the loss.

It is clear, however, that although the policies obtained by Marine ultimately failed to cover the ensuing loss, Marine did provide Transport with certificates of insurance which were satisfactory to Transport when received. That is precisely what the lease agreement required. If Transport's satisfaction resulted from lack of diligence on its part, it must be kept in mind that in the guarantee agreement, after absolutely and unconditionally guaranteeing the performance of any and all obliga-

tions of Marine, Holt agreed that it "hereby waives diligence, demand, presentment, protest or notice of any kind or any requirement that Transport exhaust any right or take any action against Marine. . . ." (emphasis supplied)

The guarantee agreement in all its terms is uncommonly broad and binding. The reason for Holt being willing to sign such an iron clad obligation is to be discovered in its brief where it reveals that Marine was indebted to it and its affiliated companies in the amount of approximately $1,000,000 and that representatives of Marine had indicated that if the Transport leases were not guaranteed, this money would not be paid to Holt.

As to the amount of the judgment, Holt has agreed that the sum determined in fixing the default judg-

ment against Marine should be binding on it.

Affirmed.

ORDER ON MOTIONS/PETITIONS

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION

4001-79T1
TRANSPORT INTERNATIONAL
POOL, INC.,

DOCKET NO. A-4001-79T1
MOTION NO. M-3730-80
BEFORE PART C

vs

JUDGES: FRITZ
POLOW
JOELSON

HOLT MARINE TERMINAL,
INC.,

MOVING PAPERS FILED MAY 28, 1981
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT JUNE 11, 1981
DATE ARGUED
DATE DECIDED JUNE 17, 1981

[STAMP]

[FILED]
[APPELLATE DIV-]
[ISION]
[June 19 1981]
[/s/ Clerk]

ORDER

THIS MATTER HAVING BEEN DULY

PRESENTED TO THE COURT, IT IS HEREBY

ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
PETITION FOR REHEARING		X	

ORDER ON MOTIONS/PETITIONS

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
4001-79T1	DOCKET NO. A-4001-79T1
TRANSPORT INTERNATIONAL POOL, INC.,	MOTION NO. M-3730-80
	BEFORE PART C
vs	JUDGES: FRITZ POLOW JOELSON
HOLT MARINE TERMINAL, INC.,	

SUPPLEMENTAL:

Not only does the appellant-movant rely solely on a statement in respondent's appeal brief to support its present contention that it does not concede that the sum determined in fixing the default judgment should be binding on it, it acknowledged in its reply brief subsequent to receipt of that allegation its recognition that "the evidentiary hearing on damages . . . could be binding upon defendant in the event defendant [appellant-movant] . . . was unsuccessful after a trial on the merits. Defendant is appealing the denial of its right to present its defenses in court." That language, which appellant-movant now suggests was "inartful," was firmed up by the concession without reservation of counsel at oral argument that

ORDER ON MOTIONS/PETITIONS

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
4001-79T1	DOCKET NO. A-4001-79T1
TRANSPORT INTERNATIONAL POOL, INC.,	MOTION NO. M-3730-80 BEFORE PART C
vs	JUDGES: FRITZ POLOW JOELSON
HOLT MARINE TERMINAL, INC.,	

---

damages on the proof hearing were binding.

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL ON FILE IN MY OFFICE

FOR THE COURT:

/s/
John W. Fritz, P.J.A.D.

/s/ Elizabeth W. Laughlin

Clerk

WITNESS, THE HONORABLE JOHN W. FRITZ, PRESIDING JUDGE OF PART C, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 17th DAY OF JUNE 1981.

/s/ Elizabeth W. McLaughlin

SUPREME COURT OF NEW JERSEY
C-39 SEPTEMBER TERM 1981

TRANSPORT INTERNATIONAL POOL, INC.,	:	
Plaintiff-Respondent	:	
vs.	:	ON PETITION FOR
HOLT MARINE TERMINAL, INC.,	:	CERTIFICATION
Defendant-Petitioner:		
and	:	
MARINE TRANSPORT SERVICE, INC.,	:	
Defendant.	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4001-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Tren-

ton, this 3rd day of September, 1981.

/s/ STEPHEN TOWNSEND
Clerk

[FILED]
[SUPREME]
[COURT SEP]
[4, 1981] [STAMP]
[/s/ STEPHEN]
[TOWNSEND]
[Clerk]

A TRUE COPY

/s/ STEPHEN TOWNSEND
Clerk

SUPREME COURT OF NEW JERSEY
M-201 SEPTEMBER TERM 1981
18,777

[STAMP]

TRANSPORT INTERNATIONAL POOL, INC.,

Plaintiff-Respondent,

vs.

HOLT MARINE TERMINAL, INC.,

Defendant-Movant,

and

MARINE TRANSPORT SERVICE, INC.,

Defendant.

[FILED]
[OCT 14 1981]
[STEPHEN W.]
[TOWNSEND]
[Clerk]

O R D E R

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of denial of petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton,

this 13th day of October, 1981.

/s/ Stephen W. Townsend
Clerk

A TRUE COPY

/s/ Stephen W. Townsend
Clerk

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-4001-79-A

TRANSPORT INTERNATIONAL POOL, INC.,	:	
Plaintiff-Respondent	:	CIVIL ACTION
vs.	:	AFFIDAVIT OF COUNSEL IN SUPPORT OF CERTIFICATION
HOLT MARINE TERMINAL, INC.,	:	
Defendant-Petitioner:		
and	:	
MARINE TRANSPORT SERVICE, INC.,	:	
Defendant.	:	
STATE OF NEW JERSEY	)	
	:	ss.:
COUNTY OF MERCER	)	

MICHAEL A. SPERO, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the attorney in charge of this file for McCarthy and Hicks, P.A., and as such I am fully

familiar with the matters set forth herein.

2. This affidavit is submitted to the Supreme Court of New Jersey in support of Defendant-Appellant's (hereinafter referred to as "Holt") Petition for Certification. The purpose of this affidavit is to categorically state that Holt has never conceded the amount of damages determined between Plaintiff-Respondent (hereinafter referred to as "Transport") and defendant Marine Transport Service, Inc. (hereinafter referred to as "Marine"). No statement was made at oral argument by your affiant that was intended to be a concession of the amount of damages claimed by Transport. Nor, to the best of my belief, was anything said at oral argument by your affiant that should have been construed as a concession.

3. Holt has always admitted that it executed the guarantees upon

which Transport based its law suit. Because of the guarantees, the possibility does exist that Holt would owe certain monies to Transport. However, Holt has never had the opportunity (as the Appellate Division recognized) to present its defenses to Transport's action against Holt. Nor has Holt had the opportunity to contest Transport's alleged damages in an adversarial proceeding. If, after an adversarial proceeding it is determined that Holt's defenses are not sufficient to defeat Transport's claim and that Hold [sic] did not successfully contest Transport's alleged damages, then the default judgment could be binding upon Holt because of the guarantees. Admittedly, the language contained in Holt's reply brief is superfluous (Drb2-42 to 51; Drb3-1 to 2). Any statements made by your affiant during oral argument concerning

the binding effect of the default against Marine had no other meaning than as set forth in this paragraph.

4. Holt has consistently contested the amount of damages claimed by Transport from the inception of this litigation. From the time it first filed and served its Answer (Da9 to 11), Holt contested damages. Holt continued to dispute the amount of damages in opposition to Transport's first motion for summary judgment (Da42), in its Brief in Opposition to Transport's second motion for summary judgment (Pa18 to 19) and its Appellate Brief (Db19 to 26). Transport was never in doubt as to Holt's contesting the amount of damages. To be sure, in its Appellate Brief, Transport stated that:

> ". . . Holt does not dispute the liability of Marine Transport Service, <u>but only the amount of damages</u> which were measured at an adversarial

proceeding." (Pb8-53 to 60). Emphasis added.

Holt has consistently maintained that the amount of Transport's damages was a critical issue to be tested in an adversarial proceeding.

/s/
Michael A. Spero

Sworn to and Subscribed before me this 6th day of July, 1981

/s/ Eileen McManimon
EILEEN McMANIMON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 11, 1984.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOLT MARINE TERMINAL, INC.,
Petitioner,
vs.

TRANSPORT INTERNATIONAL POOL, INC., *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTION PRESENTED

Is due process violated when an intermediate state appellate court holds in reliance on the concession of counsel that damages measured at an adversarial proceeding of which the party had notice and an opportunity to defend are binding on that party?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
REASONS FOR DENYING THE WRIT	7
CONCLUSION	15
APPENDIX	1a

APPENDIX

Transcript of Oral Opinion of Honorable H. Hurlburt Tomlin, J.S.C., Superior Court of New Jersey, Law Division Held April 24, 1980 ..... 1a

TABLE OF AUTHORITIES

Cases	Page
American R. Express Co. v. Kentucky, 273 U.S. 269 (1927)	11
Ball v. Chancellor, 47 N.J.L. 125 (E & A 1885)	13
Barrington v. Missouri, 205 U.S. 483 (1907)	7
Beck v. Washington, 369 U.S. 541 (1962)	11
DeGrief v. Wilson, 20 N.J. Eq. 435 (Chan. 1879)	13
Dixon v. Duffy, 342 U.S. 33 (1951)	7
Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902)	8
French v. Hopkins, 124 U.S. 524 (1888)	7
Hammerstein v. Superior Court, 340 U.S. 622 (1950)	7
Herb v. Pitcairn, 324 U.S. 117 (1974)	7
Horicon v. Longlois's Estate, 115 Vt. 470 66 A.2d 16, 9 ALR 2d 195 (1949)	9
Jackson v. Denno, 378 U.S. 368 (1964)	10
Millheim v. Moffat Tunnel Improvement District, 262 U.S. 710 (1923)	8
Monmouth Lumber Company v. Indemnity Inc. Co. of North America, 21 N.J. 439 (1956)	13
New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336 (1902)	8
New York & N.E.R. Co. v. Bristol, 151 U.S. 556 (1894)	10
Patton v. Evans, 92 Utah 524 69 P.2d 969 (1937)	9
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)	12
Salitan v. Magnus, 62 N.J. Super. 323 (App. Div. 1960)	13
Scaglione v. St. Paul-Mercury Indemnity Co., 28 N.J. 88, 145 A.2d 297 (1958)	4,13
State v. Blount, 200 Or. 35, 264 P.2d 419, 44 ALR 2d 711 (1953)	9

Stein v. New York, 346 U.S. 156 (1952) 10

United States Wire & Cable Corp. v. Ascher Corp., 34 N.J. 121 (1961) 13

Watts v. Indiana, 338 U.S. 49 (1949) 10

West Jersey & S.S.R. Co. v. Atlantic City Electric Co., 107 N.J. Eq. 457 (Chan. 1931) 13

Worcester County Trust Co. v. Riley, 302 U.S. 291 (1937) 10

CONSTITUTION, STATUTE AND RULES

28 U.S.C. §1257(3) 7,15

29 U.S.C. §1257(a) 6

R. 4:29-1 14

R. 17 8,9

OTHER AUTHORITIES

Moore's Federal Practice

4 Am. Jur. 2d, Appeal & Error §242 9

5 Am. Jur. 2d, Appeal & Error §697 9

No. 81-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOLT MARINE TERMINAL, INC.,
Petitioner,

vs.

TRANSPORT INTERNATIONAL POOL, INC., *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Law Division was unreported and oral. A transcript of the opinion and the argument of counsel is attached as 1a.

STATEMENT OF THE CASE

Essential to a just disposition of the petition for writ of certiorari is a complete understanding of the procedural and factual background behind this litigation:

Petitioner Holt Marine Terminal, Inc. (hereinafter "Holt") is engaged in the stevedoring business, primarily the loading and unloading of vessels. Respondent Transport International Pool, Inc. (hereinafter "Transport") is involved in vehicle leasing.

In the early months of 1976, Marine Transport Service, Inc. (hereinafter "Marine") approached Transport for the purpose of seeking to arrange the leasing of certain equipment. Transport, dissatisfied with the credit rating of Marine, expressed its reluctance to transact business unless Marine obtained a guarantor of any future obligations. Marine found that guarantor in Holt.

Thereafter, Transport leased assorted types of vehicles to Marine under four separate lease agreements dated January 27, 1976, March 29, 1976, May 21, 1976 and August 20, 1976. Holt, in turn, executed four separate guarantee agreements which absolutely and unconditionally guaranteed Marine's obligations to Transport. In fact, contemplating a continuing business relationship, Holt executed a master guarantee on December 13, 1976.

Marine subsequently defaulted on its rental obligations and as was its right under the lease terms, Transport accelerated the indebtedness and demanded payment and return of the leased vehicles from both the obligor and guarantor. Payment was not forthcoming; nor were the leased vehicles returned.

On May 31, 1977, Transport filed its two-count complaint in the Superior Court of New Jersey. Naming Holt and Marine as defendants, the suit sought to collect all rentals, to compel return of the leased vehicles, to obtain reimbursement for any unamortized license and registration fees and to recover attorneys' fees and costs of suit.

Following service of the summons and complaint, Holt served its answer on July 15, 1977, in which it admitted execution of the guarantees but denied the other allegations of the complaint. Only a single separate defense, lack of consideration, was raised; the defense of discharge was not included.

Marine never appeared in the action and consequently, on October 7, 1977, Transport, in accord with the rules governing the courts of New Jersey, moved on notice to Holt for entry of default judgment. On November 29, 1977, an evidentiary hearing of which Holt had notice and an opportunity to defend was held before a Judge of the Superior Court of New Jersey, Law Division, resulting in the formal entry of judgment on December 6, 1977, against Marine in the amount of 326,298.21. Holt made no appearance at the evidentiary hearing.

Armed with the default judgment against Marine, Transport twice moved for summary judgment against Holt.[1] The first motion was denied without prejudice on March 10, 1978.

The second motion, heard April 24, 1978, was granted. The trial court reasoned that Holt's claim of discharge was without merit because of the uncommonly broad guarantee and further, that the amount of damages fixed in the default judgment against Marine bound Holt. This latter result was reached based upon a line of New Jersey cases which applies a form of res judicata in similar settings:

> . . . [U]nder the doctrine of res judicata a judgment may be conclusive against one who is liable over to the judgment debtor in respect to the cause of action adjudicated, or one derivatively responsible to the

---

[1]Transport also moved to reduce the amount of the judgment and upon presentation of the appropriate affidavits, the judgment was reduced to $173,990.57.

> judgment creditor, at least where there has been notice to the third party of the prior action and an opportunity to defend afforded. The principle applies to indemnitors, sureties and guarantors.
>
> *Scaglione v. St. Paul-Mercury Indemnity Co.*, 28 N.J. 88, 104, 145 A.2d 297, 306 (1958)

On June 24, 1980, Holt filed its notice of appeal with the Superior Court of New Jersey, Appellate Division. Following submission of briefs by the parties and oral argument, the Court rendered its opinion affirming the trial court's grant of the motion for summary judgment. The appellate court perceiving Transport's argument to be that principles of res judicata prevented Marine from asserting its discharge defense or for that matter, any defense as to liability or damages, rejected the theory of conclusiveness of judgments. Instead, in interpreting the guarantee agreement, it found that as a matter of law Holt had no defense to the claim and consequently, it was liable to plaintiff.

> As to the issue of damages, the Court stated:
>
> . . .Holt has agreed that the sum determined in fixing the default judgment against Marine should be binding on it.
>
> [Pet. 9a, 10a]

This holding was based on a statement of Holt's counsel made at oral argument (Pet. 12a, 13a).

Focusing primarily on the damages issue, Holt then filed its petition for rehearing with the Appellate Division and contended that it had not conceded at oral argument that the amount of damages fixed in the default judgment evidentiary hearing were binding. The Appellate Division's response was unequivocal:

> Not only does the appellant-movant rely solely on a statement in respondent's appeal brief to support its present contention that it does not concede that the

> sum determined in fixing the default judgment should be binding on it, it acknowledged in its reply brief subsequent to receipt of that allegation its recognition that "the evidentiary hearing on damages . . . could be binding upon defendant in the event defendant [appellant-movant] . . . was unsuccessful after a trial on the merits. Defendant is appealing the denial of its right to present its defenses in court." That language, which appellant-movant now suggests was "inartful," was firmed up by the concession without reservation of counsel at oral argument that damages on the proof hearing were binding.
>
> [Pet. 12a, 13a]

The petition for rehearing was denied.

On June 26, 1979, Holt filed with the Supreme Court of New Jersey its notice of petition for certification and then subsequently, its petition for certification. It again argued that it had been discharged as guarantor by reason of the actions of Transport. Additionally, Holt contended that it had not conceded that the damages fixed in the default judgment evidentiary hearing were binding and further, to so hold would violate due process principles by depriving Holt of its claimed constitutional right to a damages hearing. The argument was buttressed by a carefully drawn affidavit in which the counsel responsible for the concession denied its making (Pet. 18a). Transport responded to the petition for certification with a brief in opposition in which it asserted that: 1) the defense of discharge was properly resolved by the Appellate Division and consequently, the liability of Holt was settled; 2) Holt through its counsel had conceded at oral argument that the amount of damages fixed in the evidentiary hearing was binding, and 3) finally, even disregarding Holt's concession, the theory of conclusiveness of judgments bound Holt to the damages fixed in that hearing.

On September 3, 1981, the Supreme Court of New Jersey summarily denied the petition for certification (Pet. 14a). Reconsideration of the denial of the petition for certification was refused on October 13, 1981 (Pet. 15a).

SUMMARY OF ARGUMENT

The petition for certiorari fails to establish a substantial federal question sufficient to vest the Court with jurisdiction under 29 U.S.C. §1257(a). Further, even if such jurisdiction can be said to exist, there are insufficient reasons to justify discretionary Supreme Court review, the issues having significance only to the parties involved.

REASONS FOR DENYING PETITION FOR CERTIFICATION

Holt asserts that the petition for writ of certiorari presents a "question of fundamental constitutional importance ripe for review" (Pet. 8) which if left unaddressed will cause Holt to "be bound by a determination of the Appellate Division as to the amount of the purported damages . . . without ever having had the full and fair opportunity to litigate either the amount of those damages or, indeed, whether any damages at all are owed by petitioner." (Pet. 9). Even a superficial examination of the claim, however, indicates there is little, if any, basis for exercise of the Supreme Court's discretionary powers and more importantly, jurisdiction may in fact be lacking.

In considering the propriety of granting a petition for writ of certiorari, the Court must always find a jurisdictional base and further, special and important reasons for the exercise of the discretionary power of review. Though there is undoubtedly an interplay between the two elements, each warrants separate consideration.

Jurisdiction here is based on 28 U.S.C. §1257(3) which provides for Supreme Court review by writ of certiorari of judgments rendered by the highest court of a state in which a decision could be had. *See, 12 Moore's Federal Practice* ¶505.01. That jurisdiction turns on the nature of the question presented, *See, e.g., Barrington v. Missouri,* 205 U.S. 483, 487 (1907); *French v. Hopkins,* 124 U.S. 524, 525 (1888) (both decided under predecessor to §1257), and requires that a federal question has been duly raised and adjudicated. *Id. ¶510.01.* Such a federal question must be substantial. *Dixon v. Duffy,* 342 U.S. 33 (1951); *Hammerstein v. Superior Court,* 340 U.S. 622 (1950); *Herb v. Pitcairn,* 324 U.S. 117, (1944). *See generally, Moore's, supra,* ¶512.01.

Naturally, no mathematical formula can be relied upon in determining what constitutes a substantial federal question.

However, some general guidelines exist:

> [I]t is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. "There must be a real substantive question on which the case may be made to turn," that is, "a real and not a merely formal Federal question is essential to the jurisdiction of this court." Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy the motion to dismiss will prevail.
>
> *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902), citing *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 345 (1902).

In other words, "if the questions on which the decision depends are found to be so wanting in substance as not to need further argument," the petition will be dismissed. *Millheim v. Moffat Tunnel Improvement District,* 262 U.S. 710, 717 (1923).

Even if all essential criteria are satisfied and certiorari jurisdiction of the Supreme Court does exist, still R. 17 comes into play to determine whether the Court should exercise its discretionary power of review. *See,* 13 *Moore's, supra,* ¶17.07. Invocation of the power is appropriate only "when there are special and important reasons therefore." R. 17.1.

Again, although no hardline guidelines can be set, it has been said that "the cornerstone of a petition for certiorari in a federal case is a showing that the question to be reviewed is one of general importance." 13 *Moores, supra,* ¶817.41 at SC 17-38, citing Manning The Dikes, 13 Record NYCBA 541, 551 (1958).

It is not the significance of a particular issue to the litigants but rather "the contribution to the development of national law" which is decisive. *Id.*

R. 17.1(a)-(c) sets forth some factors which the Court deems characteristic of cases which are of sufficient importance to warrant Supreme Court review. However, only a portion of R. 17.1(c) could arguably be considered relevant here:

> c) When a state court or a federal court of appeals has decided on important questions of federal law which has been, but should be settled by [the Supreme Court].

Again, we return to the importance of the federal law issue — a factor which plays heavily in finding Supreme Court jurisdiction. It is at this point that attention must focus on the substantiality and general importance of the petitioner's constitutional claim.

Petitioner contends that it was deprived of due process through the decision of the Appellate Division of the Superior Court of New Jersey. Particularly, Holt contends that: 1) the Appellate Division held that its counsel had conceded that the damages fixed in the evidentiary hearing bound Holt, 2) no such concession was made, and 3) to so hold, constitutes a deprivation of the claimed right to a damages hearing.

Viewing the petitioner's claim in this light, it becomes evident that the substantiality of the federal question turns on a factual issue — the concession of counsel. Certainly, there is no constitutional issue raised in a party's abandonment of an issue on appeal. It is by now well settled that an appeal or particular point on appeal may be waived and lost by the action of a party or its counsel. *See generally, 4 Am. Jur. 2d, Appeal and Error,* §242. This may occur through the counsel's expression at time of appellate oral argument of an intent to abandon or withdraw an issue from consideration, *5 Am. Jur. 2d, Appeal & Error,* §697; *State v. Blount,* 200 Or. 35, 264, P.2d 419, 44 ALR 2d 711 (1953), or through a written admissions in the appealing party's brief. *Horican v. Longlois's Estate,* 115 Vt. 470, 66 A.2d 16, 9 ALR 2d 195 (1949); *Patton v. Evans,* 92 Utah 524, 69 P.2d 969 (1937). Consequently, petitioner's claim of constitutional error hinges on a finding that no concession occurred.

That factual determination was resolved adversely by the Appellate Division of the Superior Court of New Jersey, once in its original opinion (Pet. 9a) and then again, in its denial of the petition for rehearing (Pet. 11a). The Supreme Court of the State of New Jersey refused to reconsider that factual determination when it denied the state court petition for certification.

Should the United States Supreme Court do otherwise? The stated rule is that "all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by the [Supreme Court]. Observance of this restriction in [the] review of state courts calls for the utmost scruple." *Watts v. Indiana*, 338 U.S. 49, 50 (1949). Professor Moore adds:

> An issue of fact is not "important" for purposes of R. 17. Normally, the Court will not grant certiorari to review a decision that turns solely upon an analysis of facts . . . .
>
> [12 *Moore's supra*, ¶817.41 at SC 17-43]

Here where the substantial federal question necessary to establish jurisdiction and to justify certiorari review turns on a factual issue which has been already adversely considered, the petition should be denied.

Even were we to assume the Appellate Division erred in concluding that a concession had been made, still, this would not compel the conclusion that due process had been violated. The Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. *Stein v. New York*, 346 U.S. 156 (1952), overruled on other grounds *Jackson v. Denno*, 378 U.S. 368 (1964). Thus, the mere fact that a party is unsuccessful in a matter involving life, liberty or property does not necessarily show that there has been a violation of due process. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937); nor does the Fourteenth Amendment raise a federal question in every case to test the justice of a decision. *New York & N.E.R. Co. v. Bristol*, 151 U.S. 556 (1894). In fact, even an erroneous decision of a court on matters within its jurisdiction does not

deprive the losing litigant of his due process rights where the parties have been fully heard in the regular course of judicial proceedings. *Beck v. Washington,* 369 U.S. 541 (1962); *American R. Express Co. v. Kentucky,* 273 U.S. 269 (1927).

Petitioner properly points out that a full and fair opportunity to be heard is the essence of the due process guarantee (Pet. 11). Here, petitioner Holt was accorded whatever process was due. It challenged through a petition for rehearing the Appellate Division's ruling that its counsel had conceded damages. Following a denial of that petition and reaffirmance of the propriety of the factual finding, the petitioner sought review in the New Jersey Supreme Court. Such review was denied. Thus, it is clear that petitioner was afforded all process due during the course of these judicial proceedings. To hold otherwise would create a constitutional issue in virtually every decision rendered in the courts of the United States. In any adversarial proceeding, there is inevitably an unsuccessful party. More often than not that losing litigant views the court's decision as erroneous. But does that error deprive a party of due process so as to give rise to a federal question? We think not and feel certain the Court will agree.

Here, there is yet another more basic issue which casts brighter light on the substantiality of the federal constitutional question. The thrust of the petitioner's argument is that the Appellate Division's ruling regarding the concession of counsel deprived it of its constitutional right to participate in an evidentiary hearing on damages. This contention diverts the Court's attention from the true facts for regardless of what occurred in the appellate courts, it is indisputable that petitioner Holt had notice and an opportunity to appear and participate in the evidentiary hearing fixing damages following the entry of Marine's default.

In a colloquy with the trial court during the argument of the plantiff's second motion for summary judgment, the following was said:

> THE COURT: Well, what is it Mr. Spero, that you feel Holt was prejudiced as a result of the default

judgment being entered as it was, if they elected not to participate?

MR. SPERO: Because Holt in no way felt that the default judgment against MTS would be binding upon it since it hadn't had its day in court, and an opportunity to be heard in a full trial.

THE COURT: Well, I'm afraid something is eluding me now, because they surely had notice of the matter coming on, did they not?

MR. SPERO: Did the proof, that the proof was coming on?

THE COURT: Un-huh.

MR. SPERO: Of course they did, but the proof case came on very early in the proceedings. We had service in the summer and the proof case coming on in the early fall. [8a]

Thus, regardless of what occurred in the Appellate Division, it is clear that it was not the court's decision which deprived petitioner of the right to participate in an evidentiary hearing but rather, Holt's.[2] Regretful though it might be, Holt may not now seek to shift the focus away from that declined opportunity and instead, claim constitutional error in the Appellate Division's action.

There is one last reason which militates against Supreme Court review. The Supreme Court is always reluctant to decide questions of federal constitutional dimension when state law grounds might be dispositive. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Such is the case here.

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[2] Petitioner's reliance on "those cases that hold that a failure to give notice prior to taking a default judgment violates due process" (Pet. 20) is surely misplaced here where notice of the default and the evidentiary hearing was provided to both the guarantor and principal obligor.

Respondent Transport argued in both the state trial and appellate courts that the principles of res judicata applied thereby making conclusive the default judgment, including its determination of damages, upon Holt. Reliance was placed upon a line of cases which enunciate and rely upon a theory of conclusiveness of judgments. *See, United States Wire & Cable Corp. v. Ascher Corp.*, 34 N.J. 121 (1961); *Scaglione v. St. Paul-Mercury Indem. Co.*, 28 N.J. 88 (1958); *Ball v. Chancellor*, 47 N.J.L. 125 (E & A 1885); *West Jersey & S.S.R. Co. v. Atlantic City Electric Co.*, 107 N.J. Eq. 457 (Chan. 1931); *DeGrief v. Wilson*, 20 N.J. Eq. 435 (Chan. 1879). Derived from principles of res judicata, the doctrine makes a judgment against a debtor "conclusive against one who is liable over to the judgment debtor in respect to the cause of action adjudicated, or one derivately responsible to the judgment creditor," so long as there has been notice and an opportunity afforded to the third party to participate and defend in the judgment debtor's proceeding. *Scaglione, supra*, 28 N.J. at 104. Compare *Monmouth Lumber Company v. Indemnity, Inc. Co. of North America*, 21 N.J. 439 (1956) and *Salitan v. Magnus*, 62 N.J. Super, 323 (App. Div. 1960) with *Scaglione, supra.* The doctrine has application to guarantors. *Scaglione, supra; West Jersey & S.S.R. Co. v. Atlantic City Electric Co., supra.*

The Appellate Division considered but rejected respondent's contention finding:

> Despite the reference to indemnitors, sureties and guarantors quoted above, *Id.* at 104, it must be emphasized that [*Scaglione*] concerns the application of the doctrine of res judicata "where there has been notice to the third party of the prior action and an opportunity to defend afforded." In the case we are now considering there was no prior action since the guarantor was joined as a defendant along with the primary obligor. Furthermore, no opportunity to defend was afforded the guarantor. If it had a meritorious defense, it should have been given a chance to present it at a plenary hearing.
>
> [Pet. 5a]

The Court then went on to examine and refute petitioner's discharge defense.

It is evident that as the Appellate Division perceived respondent's argument its ruling was correct insofar as it held that Holt must have been permitted to assert its defenses to its status as guarantor. If the doctrine of conclusiveness of judgments serves to bind a party who is derivately liable to the judgment creditor, the guarantor or other vicariously liable party must be afforded the opportunity to challenge that status which forms the basis for the conclusiveness of the existing judgment. Holt presented its defense which was subsequently rejected. Thus, insofar as the Appellate Division understood respondent's contention to be that Holt could not assert a challenge to its status as guarantor its ruling was proper.

However, the Appellate Division, solely because of respondent's inarticulate presentation, misunderstood respondent's argument. Respondent was not seeking to preclude Holt from asserting defenses to its status as guarantor but rather, contending that since Holt admitted execution of the guarantee agreements and its defenses were without merit, its status of guarantor was fixed. Thus, having had notice and an opportunity to present proofs at the evidentiary hearing fixing damages, the default judgment rendered against Marine, including the determination of damages, was conclusive and binding upon Holt. The case law cited unequivocally supported this proposition.

The Appellate Division's attempt to distinguish *Scaglione* by referring to the necessity of a prior proceeding fails to withstand scrutiny. If respondent had commenced suit against Marine alone, given Holt notice and an opportunity to defend of that proceeding, recovered a default judgment therein and subsequently, commenced suit against Holt on its guarantee agreements, *Scaglione* would bind Holt to that default judgment, absent proof of a meritorious defense to its status as guarantor. Why should the procedural mechanism of joinder of parties, R. 4:29-1, alter the result? Since Holt in this proceeding

had the same opportunity to challenge the damage award rendered in the default judgment proceeding and to present its defenses to its guarantor status as it would have had there been separate actions logically, equitably and legally, it should be bound according to state law principles.

Thus, adequate state grounds exist which support the Appellate Division's decision and consequently, consistent with the Doctrines of Abstention, consideration of federal constitutional issues should be avoided.

Based upon the above, there are substantial doubts as to the Supreme Court's jurisdiction under 28 U.S.C. § 1257(3). The constitutional assertions are weak, border on the frivolous and wholly unsupported by the decisional authority cited by petitioner. Even if jurisdiction was found to exist, certainly, the claim falls far short of the special and important reasons necessary to justify Supreme Court review.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for certiorari should be denied.

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(609) 365-5100

Dated: 2/11/82

By: _____
Steven G. Wolschina

Appendix

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — CAMDEN COUNTY
DOCKET NO. L-38874-76

TRANSPORT INTERNATIONAL POOL, INC.,
Plaintiff,

vs. MOTION

MARINE TRANSPORT SERVICE, INC.,
and HOLT MARINE TERMINAL, INC.,
Defendants.

April 24, 1980

BEFORE:

HONORABLE H. HURLBURT TOMLIN, J.S.C.
Camden County Courthouse

APPEARANCES:

BROWN, CONNERY, KULP, WILLE,
PURNELL & GREENE
By: Steven G. Wolschina, Esquire
For the Plaintiff

MC CARTHY and HICKS
By: Michael A. Spero, Esquire
For the Defendant, Holt.

Reported By:

Jean M. Petruzzi, C.S.R.
Official Reporter

THE COURT: Good morning gentlemen.

MR. WOLSCHINA: Good morning, Your Honor.

MR. SPERO: Good morning, Judge.

THE COURT: Gentlemen, as a matter, as a result of my having reviewed the documents that have transpired since we were here back in January, it would seem that Mr. Wolschina signified his desire to have a notice of motion for summary judgment considered which would in effect be supplemental to an earlier motion that had been prosecuted before Judge Rossetti and denied. And this was scheduled for March 7th, and then put over to March 14th but apparently not heard at that time because of the Court's convenience and we only got the thing reactivated, so to speak, during recent days. Are we in agreement on that?

MR. WOLSCHINA: Yes, Your Honor.

MR. SPERO: That's correct.

THE COURT: And I also understand that there will be a two pronged application made today by you, Mr. Wolschina. Number one will be to have an order entered which would reflect on the record a revision of the default judgment that is already heretofore been signed by Judge Menneti. And then your wish is to prosecute the motion for summary judgment in chief.

MR. WOLSCHINA: Yes, Your Honor.

THE COURT: All right. I will hear you.

MR. WOLSCHINA: Yes, Your Honor. This first application is for an order amending the judgment entered earlier in this matter by Judge Menneti. The grounds and the support for the application are set forth in the statement and the affidavit filed in conjunction with the petition. I don't believe

there's any opposition to the actual amendment to this judgment by Mr. Spero, but rather there is probably an objection to what the effect of this new amended judgment would be.

I submit, Your Honor, in view of the fact that the plaintiff has come forward and at this time is seeking to reduce the size of the judgment against Marine Transport Service, Inc., who is a default judgment debtor here, that at this time the application should be granted because, as I stated, there's no prejudice since the judgment is to be reduced.

I submitted with the moving papers a form of order which sets forth the dollar amount requested in this amended judgment. And I would move at this time that Your Honor grant this motion and execute an order holding the defendant, Marine Transport Service, Inc., liable in the amount of $173,990.57 with interest at the rate of eight percent per annum from the date of the original judgment which is December 6, 1977 together with costs.

THE COURT: Well, I have before me your letter dated February 28, 1980 which does submit the amended judgment with other supporting documents. And I recognize that the unexecuted affidavit or affidavits have now been executed and filed and are contained in the file.

I am, I guess you don't have anything to say on this facet, do you Mr. Spero?

MR. SPERO: No, except that I commend Mr. Wolschina for bringing to the Court's attention newly discovered evidence. I have no objection to the procedure, but of course, the effect of it I will have objection to.

THE COURT: I understand that. All right. I'm affixing my signature then to this order for judgment as of today which is the 24th of April and I'll hand the original to you, Mr. Wolschina and instruct that you see to it that appropriate filing is accomplished of the original and copy with the Clerk of the Superior Court.

MR. WOLSCHINA: Yes, Judge.

THE COURT: I wish you'd read to me the amount, is it 173,990.57.

MR. WOLSCHINA: Yes.

THE COURT: All right. Judgment is accordingly entered in the described sum of $173,990.57 with interest at the rate of eight percent per annum from the date of the prior judgment, December 6, 1977.

All right. You may proceed.

MR. WOLSCHINA: Thank you, Your Honor. The second prong this morning is plaintiff's application for a summary judgment due to the fact that there are no material facts in dispute at this time. The application is for judgment against the defendant, Holt Marine Terminal, Inc. The basis for this application primarily is that the earlier judgment entered by Judge Menneti and the amended judgment entered today are conclusive as to this defendant, Holt. This is due to the doctrine of Res Judicata for this doctrine to apply in this matter, we simply have to find out that this co-defendant, who is a surety or a guarantor was on notice and had the opportunity to defend with respect to the earlier judgment against the judgment debtor, Marine Transport Service, Inc. Here, the defendant Holt Marine was a defendant from the outset of the case, was on notice of the default judgment application and in fact, had itself at some point entered a default judgment on a cross claim against the co-defendant.

The law in New Jersey is clear on this and our Supreme Court has stated that where there is notice and the opportunity to defend a judgment against a judgment debtor is conclusive against the guarantor. That leaves us with the only issue being whether or not this defendant, Holt, is a guarantor. The papers submitted by the defendant, Holt, have shown and it has been admitted that it did guarantee the obligations and it did execute the guarantees which are attached to the moving papers. That being so, we can look at the various defenses raised by defendant Holt to its guarantee. The answer sets forth the defense of

a failure of consideration I believe from the papers recently submitted meaning, the trial brief and the papers in opposition to the summary judgment motion, that that has been abandoned. If it has not been abandoned, I believe the papers submitted by way of the brief with the references to the deposition of Mr. Bernard Gelman show that that defense has no merit and that as a matter of law it has no merit. The other defenses that are raised have to do with waiver, meaning that the plaintiff waived various provisions with the defendant, Marine Transport Service, which have prejudiced Holt Marine.

These defenses were not raised in the answer to the complaint filed by Holt.

I submit that at this time it is too late to submit these defenses and they can very well be denied on the grounds that they were not raised earlier. Should the Court choose to consider the defenses, it would appear that there are no material facts involved with the defenses that are raised such that the Court can grant judgment here as a matter of law.

The first waiver defense raised has to do with prepayment of fees. That's a provision of the lease wherein it was raised at some point that there has been a requirement that payments on rentals be prepaid by the principal debtor, Marine Transport. I believe the defendant Holt Marine, has abandoned that particular defense at this point and that leaves us with only one defense which has to do with an insurance requirement.

According to this position, Holt Marine says that the plaintiff permitted or waived the requirement of Marine Transport Service to provide proof of insurance. The defense raised here completely ignores the scope of the undertaking of Holt Marine. What Holt Marine signed here and it signed it five times, was an unconditional guarantee. Not only was it an unconditional guarantee, but it also was a very broad guarantee, in that they guaranteed each and every obligation of MTS. The way it's stated in the lease document is any and all obligations under that lease agreement including, but not limited to payment of rentals and charges. So this defendant, Holt, not only guaranteed certain provisions of the lease unconditionally, but it guaranteed all aspects of the lease and one of these lease requirements has to do with obtaining insurance.

For Your Honor's consideration this morning, there is no need for us to consider whether or not there was insurance submitted by MTS. As a matter of law, and by the by even a strict construction of the lease document, that obligation was shared by this defendant, Holt. Furthermore, not only was there a requirement of obtaining insurance that defendant Holt guaranteed, there's also an indemnification provision within that same paragraph six wherein the primary obligor, Marine Transport Service, indemnified the plaintiff for any loss and it lists the various losses there.

In executing this unconditional guarantee of any and all obligations of defendant, Marine Transport, Holt also guaranteed or undertook this indemnification. I submit Your Honor, that as a matter of law, the allegation or contention that the failure, the alleged failure of Transport International Pool to insist upon proof of insurance is insufficient.

The brief of Mr. Spero sets forth three areas where he contends there are genuine issues of material fact.

The first would be, has to do with the plaintiff's waiver of insurance. As I just stated I feel there are no material facts in dispute here because of the obligations as set forth under the guarantee. The other two material facts raised concern issues that were a part of the earlier judgment whereby this particular defendant, defendant Holt, undertook the doctrine of Res Judicata, is bound by it. That has to do with a record keeping requirement and also a question concerning ownership of the vehicles. Those matters are a matter that was taken care of, the earlier judgment which today has been reduced.

So, I submit that if it is only raised that these three areas are areas wherein we can find a material fact in dispute, I feel that my adversary is incorrect because number one, on the insurance it was an unconditional guarantee. There was not a conditional guarantee, plus it was a very broad guarantee wherein Holt Marine guaranteed each and every obligation under that lease. And this would include the insurance.

That's all I have, Your Honor. Thank you.

THE COURT: Mr. Spero?

MR. SPERO: Your Honor, my reading of the law of this State gives me a different result than that obtained by Mr. Wolschina. In the subject of the prior judgment being binding upon my client, I think Mr. Wolschina is referring to the Scaglione case which is at 28 New Jersey 88. But that case just states that a judgment may be conclusive against the third party, it doesn't say it has to be, it doesn't say it's mandatory. It seems to be discretionary with the Court. There is no law in this State binding the prior judgment upon this Court. The prior judgment cannot be binding upon Holt because at the time the judgment was obtained by plaintiff, discovery was not yet concluded. And Holt was in no way in any position to defend itself in a formal case brought on as it were, for proofs against the defaulting party. That would have put us in the position of stepping into Court and taking the representation of MTS which is something that the guarantee agreements do not encompass although they do seem to be quite encompassing, they do not bind Holt to any judgment obtained by Transport Pool against MTS.

THE COURT: Did Holt not have timely ability to be participant in the proceeding along with the defaulting debtor?

MR. SPERO: I would have to concede that Holt could have come into the courtroom and sat before Judge Menneti when the proofs were taken, but Holt would not have been in any position to participate.

THE COURT: Weren't they named in the action at the outset?

MR. SPERO: Was Holt a defendant? Certainly.

THE COURT: And they elected not to defend, not to enter an appearance.

MR. SPERO: At the proof case.

THE COURT: No, I mean after they were served.

MR. SPERO: I think you have lost me. Holt always filed an answer. Are we talking about Holt or MTS?

THE COURT: Holt.

MR. SPERO: Holt filed an answer timely.

THE COURT: Did they pursue timely discovery?

MR. SPERO: I would have to check my file for the date of the first set of interrogatories to see what date they were sent out, but they answered, there was no objection to the receipt of them by plaintiff.

THE COURT: Well, what is it Mr. Spero, that you feel Holt was prejudiced as a result of the default judgment being entered as it was, if they elected not to participate?

MR. SPERO: Because Holt in no way felt that the default judgment against MTS would be binding upon it since it hadn't had its day in Court, and an opportunity to be heard in a full trial.

THE COURT: Well, I'm afraid something is eluding me now, because they surely had notice of the matter coming on, did they not?

MR. SPERO: Did the proof, that the proof was coming on?

THE COURT: Uh-huh.

MR. SPERO: Of course they did, but the proof case came on very early in the proceedings. We had service in the summer and the proof case coming on in the early fall.

THE COURT: Well, I'd like you to continue your argument, but I personally am frankly, I'd like both of you to enlighten me as to the procedure. I haven't perhaps gone that

far back in my review analysis of this. The plaintiff effected service upon both defendants, an action was filed by the defendant, Holt. By whom?

MR. SPERO: By myself.

THE COURT: No answer was filed by the co-defendant?

MR. SPERO: To the best of my knowledge that's correct, and I can only say that I do not know for a fact whether service was effectively made upon MTS. But I assume it was.

THE COURT: Okay. Then what next happened? Let me ask you, Mr. Wolschina?

MR. WOLSCHINA: In November, I don't have the date right here of when the service was made, let me check it. The complaint was filed on May 31, 1977, and I know the default hearing before Judge Menneti was held in November of 1977.

THE COURT: And he executed the order on December 6, 1977.

MR. WOLSCHINA: So there would appear to be approximately at least a three month period there but I don't have the service date on the defendant Holt.

MR. SPERO: The answer was mailed out to plaintiff July 15, 1977.

THE COURT: What is there in our record to show that, I'll ask this of you Mr. Wolschina, to show that the defendant, Holt, had notice and was called upon to appear and defend on behalf of the co-defendant?

MR. WOLSCHINA: I can answer the first part of the question. There was, there was actual notice on them, I have correspondence, and it was not just one or two pieces of correspondence because the matter was adjourned on at least two occasions, I believe.

As to whether or not their, as to how Holt was put on notice that it was to come in and actively defend, I would, I have no way that I can give you any documentation on that. But they were being put on notice by me that they were to come in and this is their chance to cross examine the witnesses, etc.

THE COURT: Give me a few seconds here, gentlemen, while I look at the record a little bit more.

Isn't it in practical effect looking at the second count of the complaint Mr. Spero, that by the very pleadings this, this indicates defendant, Holt, had full knowledge of the fact that if it suffered it could get to stand in default and suffer default judgment to go against the co-defendant, it was in effect putting itself into a position of somewheres along the line having to have that validity of the guarantee and indemnity agreement resolved either for or against the defendant, Holt?

MR. SPERO: It was always the position of Holt that at one time or another Holt would have its opportunity to defend itself on its own against the claim of the plaintiff. Holt did not look upon signing of the guarantee as a strict liability situation. If I interpret what the Court is saying correctly, the default by itself ended the case right there. MTS's default terminated the inquiry and we admit we executed the guarantees, but it almost seems to me as well that's the ball game right there.

I have a letter, Your Honor was inquiring earlier, a copy of a letter written by Mr. Wolschina on September 19, 1977 addressed to Mr. Kerins, the County Clerk, I presume. Wherein it states that in closer filings as plaintiff's notice of motion I do enter judgment of denial, I set forth the motion date in parenthesis October 7, 1977 for the return date of this motion but I am flexible so as to whether it can be put down for proofs I will require approximately one week's notice in order to allow me to arrange for my witnesses to attend. It goes on to say that the original has been filed in Trenton. Thank you for your cooperation.

There's a cc to me, that's the extent of the original notice of the plaintiff's case being scheduled.

THE COURT: Uh-huh. Well, I don't know whether it constitutes an application of collateral estoppel or laches or waiver, but one thing is for sure, the defendant, Holt, did not see fit to in any way participate or ask the Court to let it participate in the hearing that transpired before Judge Menneti; is that correct?

MR. SPERO: That's correct, because of our understanding of what our rights were.

THE COURT: Uh-huh. All right. Go on with your argument.

MR. SPERO: If I can remember where I left off. Mr. Wolschina has indicated that he thinks our defense is untimely. It's my position and our position, that the defense that plaintiff waived the requirements of its contract with defendant MTS, is adequately encompassed by the general denial contained in our answer. Plaintiff is certainly not prejudiced by this defense of failure to obtain insurance, they have known about it for approximately two years, and it in effect goes to it, it's a threshold question in this matter when Holt signed the contract of guarantee, it was after review of the master vehicle lease agreement. We have affidavits from two officers of Holt, Bernard Gelman and Lorraine Robbins, these affidavits are not opposed in any way by plaintiff. The affidavit of Mrs. Robbins affirms Mr. Gelman's and in Mr. Gelman's affidavit he explains that the vehicle lease agreement was read, understood by them, and because of the insurance provisions they understood it was their interpretation that they were undertaking a limited risk.

And I think they had the right to rely on the lessor, Transport Pool, satisfying itself that these vehicles were insured before they let them out to cross the oceans. We find out obviously that they were not so insured because we have this claim. Had they been insured for, for foreign exposure we would have a different set of facts. But I believe that plaintiff would have been paid for the loss of these vehicles a long time ago. And we also say to the Court that plaintiff should not have let any units out to MTS without receiving proof of insurance.

Plaintiff did forward to me in January of this year, various certificates of insurance but I think if the Court examines them, even though this is not an admiralty court, the Court would see that these do not cover ocean voyages of plaintiff's equipment. The majority of them appear to be for insurance at Holt's facility while cars are there or for fleet cars.

So, I think there is a great factual issue in this whole area of the insurance requirement, what it meant, what was Holt led to believe, what did Holt rely on, what was Holt led to believe by plaintiff, and these agreements were all drafted by plaintiff, and they have to be construed against plaintiff.

As far as the dollar amount of the default judgment which has just been amended today against MTS, Holt is faced with taking that on face value. We have no way to challenge the figures as presented, we have no way to challenge what went into the record keeping to produce these figures for alleged rental arrears, we don't know how they were produced, we don't know if they were accurate, we don't know the methodology that went into it. And for these reasons I think there are many questions important enough, genuine material factual issues that require a full trial.

THE COURT: Do you have anything more, Mr. Wolschina?

MR. WOLSCHINA: No, Your Honor, just in conclusion, I believe the law is clear, I believe the absence of a material fact in issue is clear, and I believe that we should not at this late date try to determine the unconditional guarantee of this defendant into a guarantee that suddenly has become conditioned upon certain insurance certificates or proofs being presented. That's all I have, Judge.

THE COURT: You don't though this morning mention that other alleged defense of the requirement of prepayment of rent on all leases in excess of thirty days.

MR. SPERO: That, that is not in our papers in opposition to the motion for summary judgment. In further talks to my client in preparation for trial, it was determined that they

had not read the documents which contained this provision, the master vehicle lease agreement does not have that language. The interchange agreements do, and my clients did not see the interchange agreements.

THE COURT: Uh-huh. Well, at the risk of over simplifying the situation, I feel that the plaintiff is entitled to his summary judgment against the defendant, Holt Marine Terminal, Inc. I think as I have remarked before that the complaint by its terms is extremely simple and pleads the obligation of the defendant, Holt Marine Terminal, Inc. on the several guarantee and indemnity contracts. And upon my reading of those documents they seem articulate to an extreme. In fact, I have even thought that when I would be called upon to create a comprehensive document I might indeed draw from the language of these documents as a form.

I think whoever worked it out had a pretty good comprehension of what was the intention of the parties. I get the feel from my conversance with the writings that make up this record, that it was important to the defendant, Holt Marine Terminal, Inc. that the plaintiff continued to do business with Marine Transport Service, Inc. And that because it was important to them, they were glad to execute the guarantee indemnity documents to keep the business relationship going.

I don't think that there are debatable issues of fact which would cause me to do anything but grant the application of the plaintiff at this time.

So that judgment is accordingly entered against the defendant, Holt Marine Service, Inc. in the amount of $173,990.57. The same amount as has been entered against the defendant, Marine Transport Service, Inc., and I think that it should have the additional amount included of interest at the rate of eight percent per annum from December 6, 1977. Inasmuch as that will be the amount outstanding of the judgment against the co-defendant.

Are there any questions?

MR. SPERO: Yes, Judge, just for my further understanding is your decision based on the principle of the prior default being Res Judicata against Holt or is it based on that there just

simply is no issue of fact and as a matter of law it must go in plaintiff's favor?

THE COURT: I think it's based on Res Judicata and I think that causes it to be a situation where there's no debatable issue of fact as a matter of law. In other words, these defendants, or this defense and I guess there is but the one defense, isn't there, the subject —

MR. SPE O: That's correct.

THE COURT: Of insurance? I feel is not open to the defendant, Holt Marine Terminal, Inc., because they elected to refrain from participating in the default judgment procedures.

Is that the point that you're making, sir?

MR. WOLSCHINA: Your Honor, I made the point that even if I went beyond that, even if this insurance claim was raised and could be heard in view of the scope and unconditional nature of the obligation undertaken by Holt, there is no material issue in fact. They can not raise a defense based upon something that its primary obligor did not do because they insured, excuse me, they guaranteed its performance.

THE COURT: Well, I think Mr. Spero that I should incorporate that into the holding of the Court that I do feel as I said in my remarks earlier that the text of the guarantee agreement is all embracing to a point, that it would preclude this being urged as a defense.

You'll submit an order, sir?

MR. WOLSCHINA: Yes, Your Honor, thank you.

THE COURT: All right.

MR. SPERO: Thank you, Judge.

THE COURT: Nice to be with you gentlemen again this morning.

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I, JEAN M. PETRUZZI, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript, to the best of my ability of the stenographic notes taken by me in the above-captioned matter.

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